way over land and through buildings. Competitive telecommunications carriers, by definition, do not enjoy such "abilities." Their ability to duplicate the incumbents' rights-of-way is rendered impotent not only by the economics of the venture (a venture which the monopolist financed largely under rate-of-return regulation), but also by the plain refusal of individual MTE owners to admit the facilities of a subsequent carrier (or, as is also commonly encountered, by raising the cost of entry to levels so high that it makes entry an uneconomic enterprise). Because access to rights-of-way are a critical component of providing competitive service and because they cannot be duplicated, rights-of-way constitute an essential facility.[48]

Regulatory oversight traditionally has imposed broad duties to deal upon regulated utilities which operate concurrent with antitrust laws to enforce general antitrust principles. In these efforts, regulators seek to prevent monopolists from leveraging monopoly power over essential facilities in one market, albeit lawfully derived, to foreclose competitive entry in other markets.[49] The Seventh Circuit used this rationale to hold that a monopolist must make essential facilities available to competitors who could not duplicate the facilities.[50]

---

48 See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-1133 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983). The court described the four elements necessary to establish liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

49 See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law ¶ 787c1 (1996)(noting that "the 'essential facility' doctrine may have some relevance in regulated monopolies where it serves to limit the monopolist's power to expand its monopoly into 'adjacent' unregulated (or less regulated) markets. . . . Although antitrust is not concerned with rates as such, it becomes concerned when the utility's attempt to enlarge profits eliminates competition in a collateral market capable of being competitive").

50 See MCI Communications Corp. v. AT&T, 708 F.2d 1081.

Section 224 represents a statutory method of achieving this goal. In its efforts to minimize the prospective operation of historic monopoly power over essential facilities, Congress required the provision to telecommunications carriers of access to, inter alia, rights-of-way under utilities' ownership or control. The intent, when viewed through the lens of even a rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the Commission to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. The Commission's proposed interpretation of Section 224 to include utility rights-of-way and conduit within MTEs will facilitate dismantling monopoly control over tenants in MTEs, a result fully consistent with the stated goal of the 1996 Telecommunications Act.[51]

2. The Term "Right-of-Way" Encompasses A Broad Array Of Property Interests.

Although the term "right-of-way" is not defined in the Communications Act, the Commission is correct that easements and rights-of-way have generally been accorded synonymous meanings.[52] Congress is not unfamiliar with the term in the context of common carriers as evidenced by other statutes. These statutes, and the cases interpreting them, reveal that rights-of-way are not rarely encountered. Rather, they comprise a legal interest, often less

---

51 The Commission should amend the definition of "conduit" contained in Section 1.1402(i) of its rules to exclude the limiting language of "in the ground." Such a modification is warranted given that no such limiting use of the term exists in the statute. Moreover, the modification will permit conduit within MTEs to expressly fall within the scope of the Commission's definition, consistent with the statute and the Commission's tentative interpretation thereof.

52 Notice at ¶ 42.

than a fee, to use or pass over another entity's property.[53] Some courts have defined this right as an easement[54] while others describe a right-of-way as a license or contractual agreement.[55] Regardless of the particulars, rights-of-way encompass a broad conceptual spectrum of property

---

53 See Black's Law Dictionary 1326 (6th ed. 1990) (defining a right-of-way as the "[t]erm used to describe a right belonging to a party to pass over land of another"). The Federal Bureau of Land Management's rules offer a definition of right-of-way that supports this broad view: "the public lands authorized to be used or occupied pursuant to a right-of-way grant." 43 C.F.R. § 2800.0-5(g).

54 See, e.g., Bd. of County Supervisors of Prince William County, Virginia v. United States, 48 F.3d 520, 527 (Fed. Cir. 1995)("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple estate"), cert. denied, 116 S.Ct. 61 (1995); see also Great Northern Rwy Co. v. United States, 315 U.S. 262, 279 (1942)(rights-of-way granted by the 1875 Right of Way Act to constitute easements). The Right of Way Act of 1875 offers an example of the legislative construction of a right-of-way. The goal of the Right of Way Act, which granted rights-of-way to railroads, is closely analogous to the driving force behind Section 224. The law was designed to promote the public interest by facilitating the construction of nationwide common carrier facilities through grants of access to lands not owned by the common carrier. Interpreting the Act, the Supreme Court determined that Congress used the term "right-of-way" interchangeably with easement. See id. The Court observed that "Congress itself in later legislation . . . interpreted the Act of 1875 as conveying but an easement. The Act of June 26, 1906, declaring a forfeiture of unused rights of way, provides in part that: 'the United States hereby resumes the full title to the lands covered thereby [by the right of way] freed and discharged from such easement.'" Id. at 276 (citations omitted). Moreover, the Court noted that the legislative history of a similar Act passed later that year expressed the view that rights-of-way and easements were to be viewed interchangeably. "The House committee report on this bill said: 'the right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes.'" Id. at 277 (quoting H. Rep. No. 104-4777, 59th Cong., 1st Sess. at 2).

55 See, e.g., Wilderness Society v. Morton, 479 F.2d 842, 853-54 (D.C. Cir. 1973) ("A right-of-way is most typically defined as the right of passage over another person's land. It has been said that '[a] right of way is nothing more than a special and limited right of use,' a definition that sounds remarkably similar to the special land use permit issued in this case")(citations omitted), cert. denied, 411 U.S. 917 (1973).

interests and the Commission need not limit the definition of a right-of-way to one particular interest for purposes of Section 224.[56]

3. The Commission Must Define The Scope Of Utility Rights-Of-Way To Permit Use And Access Consistent With Section 224.

Many incumbent utilities are likely to claim that their private rights-of-way do not permit access or use by third parties, that their private rights-of-way do not permit uses different from existing uses, or that negotiation with, approval by, and compensation to the owner of the underlying fee is required before access may be granted. These assertions are not only erroneous, but also threaten to undermine the considered goals of Section 224 by denying access to telecommunications carriers when rights-of-way pass over private property. Deference to state law definitions of the scope of a right-of-way would run counter to the national approach promoted by Section 224. The Commission should define the scope of a utility right-of-way for purposes of Section 224 in such a manner as to permit use of such rights-of-way by competitive telecommunications carriers. This definition need not otherwise alter State law. State law definitions of the scope of easements would remain unchanged, except in cases of applying the federal obligations in Section 224.

When viewed together, the cases demonstrate that the design manifested in the Pole Attachment Act of 1978 and the Telecommunications Act of 1996 may be promoted in the manner recommended by Teligent. These cases recognize that statutorily designated third parties may lawfully access the rights-of-way owned or controlled by utilities without the need for

---

[56] A textual analysis lends support to this position. Section 224 applies to rights-of-way "owned or controlled" by the utility, demonstrating that an interest less than ownership suffices for the statute's purposes. 47 U.S.C. § 224(f)(1)(emphasis added).

negotiations with, approval of, and compensation to the owner of the servient property. As the Eleventh Circuit stated:

> Since most developers voluntarily grant easements for use by utilities . . . Congress may force the developer to allow a cable franchise to use the easement without offending the taking[s] c[l]ause of the Constitution. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television as a user.[57]

In ruling on whether an electric utility's easement would allow a cable operator to gain access to a subdivision through use of such easement, the Fourth Circuit determined that:

> [t]he fact that an additional wire would be introduced to the many others on the poles does not impose any meaningful increase of burden on [the servient estate's] interest in the underlying property. . . . Moreover, the electrical signals themselves provide no basis for distinction for purposes of measuring the increased burden on the servient estate. Any possible difference would be impalpable and would not impose an additional burden on the servient estate.[58]

Ultimately concluding that the cable operator could use the electric utility's easement over private property, the court noted that it was immaterial for easement purposes that the cable operator was

---

[57] Centel Cable Television v. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990)(quoting Centel Cable Television v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988)). Some cases have expressed an unwillingness to permit a cable operator's access to any building linked to electric, telephone, or video services. See, e.g., Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 605 (11th Cir. 1992), cert. denied, 506 U.S. 862 (1992); see also Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1174 (4th Cir. 1993). However, these cases were decided under 47 U.S.C. § 621(a)(2). Section 621(a)(2)'s compensation mechanism is designed only for damages from the installation, operation or removal of facilities whereas Section 224 is designed to provide "just and reasonable" compensation for access separate from the aforementioned damages. Moreover, by its terms, Section 621(a)(2) is limited to public rights-of-way and dedicated easements, whereas Section 224 is not so limited.

[58] C/R TV v. Shannondale, 27 F.3d 104, 109 (4th Cir. 1994).

not a telephone company, stating that "[t]he transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."[59]

Expansion of an existing utility right-of-way over private property to accommodate technological advances is deemed to be within the scope of the original easement and does not require additional compensation to the underlying property owner.[60] Satisfaction of congressionally-mandated access requirements reasonably may be deemed substantially compatible with existing utility easements and should not require that any additional compensation be paid to the underlying property owner.[61]

---

59 Id. Moreover, to the extent that a clause allowing "reasonably necessary" use of the easement exists in an easement contract, the Ninth Circuit has held that "compliance with mandatory federal programs imposing legal obligations on [the utility] is 'reasonably necessary' to the installation of [additional facilities within the easement]." Pacific Gas Transmission Co. v. Richardson's Recreational Ranch, 9 F.3d 1394, 1396 (9th Cir. 1993).

60 See C/R TV, 27 F.3d at 108 ("West Virginia cases construe easements to give the easement holder a right 'reasonably necessary' to carry out the purpose of the grant, including the right to utilize technological improvements."); Centel Cable Television Co. v. Cook, 567 N.E.2d 1010, 1014 (Ohio 1990)(holding that "the transmission of television signals through coaxial cable by a cable television company constitutes a use similar to the transmission of electric energy through a power line by an electric company"); Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 803 (1985)(finding that the installation of cable equipment to a pre-existing utility pole did not materially increase the burden on the underlying estate and was consistent with the primary goal of the easement, to provide for wire transmission of power and communication).

61 It is important to note that the cases cited by the Notice concern an attempt by the courts to avoid constitutional issues when interpreting a particular statutory provision. Notice at ¶ 47, n.106. By contrast, the constitutionality of Section 224 has been challenged and upheld in the courts before and after the 1996 amendments. Most recently, the court concluded that the provision expressly provides for a taking of property and survives constitutional scrutiny because it provides for just compensation in exchange for the taking. Gulf Power Co. v. United States, 998 F.Supp. 1386 (N.D. Fl. 1998).

In practice, a private easement's prohibition of telecommunications carrier access to the right-of-way appears to be an issue overstated by the incumbent utilities. The New York State Investor Owned Electric Utilities note that the leading New York case held that "utility company easements are apportionable to cable operators even though the scope of the easement may not specifically include CATV."[62] They go on to state that:

> [a]pportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.[63]

Moreover, in the "Access to Poles, Conduit and Rights of Way: Technical Service Description" filed with the Commission by BellSouth in connection with its South Carolina Section 271 application, BellSouth states the following:

> Where BellSouth has any ownership or rights-of-way to buildings or building complexes, or within buildings or building complexes, BellSouth will offer to CLEC through a license or other attachment the right to use any available space owned or controlled by BellSouth in the building or building complex to install CLEC equipment and facilities as well as ingress and egress to such space.[64]

---

62 Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Comments of New York State Investor Owned Electric Utilities* at 25 (Sep. 26, 1997).

63 Id.

64 Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, *Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina*, Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997).

This offer suggests that BellSouth believes it may lawfully offer such access to its private rights-of-way.

Finally, electric utilities may already use their electric easements for purposes other than the transmission of electricity. Indeed, the Commission's rules contemplate the conduction of radio signals through public utility A/C power lines for transmission to AM radio receivers.[65] Moreover, the Wall Street Journal has reported on technological advances by United Utilities and Northern Telecom which may permit the provision of telephone service and Internet access service over the power lines that bring electricity to homes and businesses.[66] Electric utility research of this sort suggests that electric utilities themselves view their electric easements as compatible with the provision of telecommunications services. The Commission should affirm that utilities' private rights-of-way are accessible by carriers offering different services and using similar facilities.[67]

4. The Commission Should Define The Scope Of Utility Rights-Of-Way To Include The Space Necessary To Provide Telecommunications Service Using Any Available Distribution Technology Regardless Of The Technology Used By The Incumbent.

Similarly, confusion is likely to arise concerning the scope of expressly undefined rights-of-way. In many instances, the scope of a utility's ownership or control of an easement will be

---

65 See 47 C.F.R. § 15.207 (establishing electric utility conduction limits).

66 See Gautum Naik, "Electric Outlets Could Be Link To the Internet," Wall Street Journal at B6 (Oct. 7, 1997).

67 See Telecommunications Services Inside Wiring, CS Docket No. 95-184, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-376 at ¶ 180 (rel. Oct. 17, 1997)(the Commission recognizing its authority to review restrictions imposed upon the use of existing easements or rights-of-way to provide new or additional services).

difficult to ascertain because its rights have not been reduced to writing. It is important to note that many utilities, including ILECs, have installed conduit and use rights-of-way within an MTE without having entered into a written agreement with the MTE owner defining the rights granted to the utility. The natural propensity toward this type of arrangement is best understood when it is remembered that many of these arrangements developed in monopoly environments. The prospect of additional providers requiring access to the premises typically was not contemplated. Thus, it is important for the Commission to offer guidance on the scope of otherwise undefined utility rights-of-way within MTEs for purposes of Section 224.

If the utility does not occupy or have rights to occupy any specifically defined space, it would be reasonable to presume that the utility would have rights to occupy any spaces to which access would be reasonably necessary in order to provide its service using any one of the variety of distribution technologies available now or in the future. For example, unless the MTE owner has affirmatively prohibited the utility from placing facilities on the rooftop or in a certain space within the MTE, it should be assumed that such access is permitted. In this regard, Teligent agrees with the position asserted in WinStar's Petition for Reconsideration and Clarification[68] that even where a utility has chosen not to use the right-of-way for distribution facilities, it should be required to permit CLEC access to such right-of-way for the distribution facilities of the CLEC.

---

[68] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *WinStar Communications, Inc. Petition for Clarification or Reconsideration* (Sep. 30, 1996).

In this regard, it is important to note that many utilities, including ILECs, presently maintain antennas on MTE rooftops to transmit telecommunications and/or video signals.[69] If ILECs and other utilities are securing rooftop access derived from their utility status, CLECs must be given the same opportunity.

5. Section 224 Applies To Rights-Of-Way Over Private Property

The Commission is also correct to interpret the absence of any qualifier in Section 224 as to public and private rights-of-way to mean that access to utility easements over private property (private rights-of-way) are covered as well as those over public property (public rights-of-way).[70] This interpretation is particularly sound given that Section 253 -- a provision adopted simultaneously with the amendments to Section 224 -- *does* contain a qualifier. Established principles of statutory interpretation dictate that the absence of such a qualifier in Section 224 is

---

69 See, e.g., "Bell Atlantic Debuts Satellite Television Service," Communications Today, (September 18, 1999)("Using a single rooftop dish, Bell Atlantic can supply digital signals to every residence in a building. [Bell Atlantic] engineers and technicians also will equip each building with an appropriate rooftop antenna capable of receiving local digital television broadcasts . . . "); "BellSouth, GTE Still in MMDS Game," Multichannel News (November 30, 1998)("GTE also entered wireless cable through acquisition, purchasing Oahu Wireless Cable in Oahu, Hawaii, in May 1997."); Su-Jin Yim, "Cellular Technology Holds an Edge in Race for Fast Internet Access," The Oregonian (February 16, 1999)("In April [1999], U S WEST plans to start experimenting in its Minneapolis labs with fixed wireless Internet access for home users."); Mimi Whitefield, "BellSouth to Build Cable, Internet Service in Miami Area," The Miami Herald (May 24, 1999)("During the fourth quarter [of 1999], BellSouth also will introduce wireless cable to South Florida. It already offers digital wireless cable in Orlando, Atlanta and New Orleans."); Michael E. Kanell, "BellSouth Considers Satellite for TV Service," The Atlanta Constitution at D1 (May 19, 1999)("To be a customer for BellSouth's wireless [cable] service, a customer must have a receiver placed on a roof . . . ."); Communications Daily, May 7, 1999 (noting that the FCC Cable Bureau said that "even though [BellSouth's] service was wireless cable, its ownership by BellSouth meant it fell under LEC effective-competition rules").

70 Notice at ¶ 41.

meaningful.[71] If "private" right-of-way is to mean anything, the term must refer to rights-of-way secured over private property (as distinct from public property such as streets and other thoroughfares).[72]

6. A Utility Right-Of-Way Need Not Be Owned By The Utility To Fall Within Section 224.

The "owned or controlled" language of Section 224 indicates that utility ownership of conduit or rights-of-way is not necessary to trigger the Section 224 access requirements. Mere utility control is sufficient. This further supports the reading of rights-of-way to include private rights that are not secured in fee simple. Moreover, use of the term "controlled" suggests that even where an MTE owner owns the intra-building conduit, if the ILEC maintains control over that conduit (i.e., pursuant to a maintenance agreement), that conduit is a Section 224 conduit or right-of-way to which the competitive telecommunications carrier should also have access.

7. The Commission Should Continue To Require A Utility's Exercise Of Eminent Domain Authority Where Necessary To Accommodate Telecommunications Carrier Facilities.

Consistent with the *Local Competition Order*, if an MTE owner seeks to prohibit a utility from allowing a telecommunications carrier access to the rooftop notwithstanding a Section 224

---

71 See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)(noting the Supreme Court's "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); see also Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 209 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect")(citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

72 Moreover, Section 224 requires the provision of nondiscriminatory access to "any pole, duct, conduit, or right-of-way" owned or controlled by a utility. 47 U.S.C. § 224(f)(1) (emphasis added). The word "any" cannot reasonably be interpreted as a term of limitation.

request, the utility should be required to exercise its authority of eminent domain where such power exists, even if the utility's right-of-way was secured initially by agreement rather than through the exercise of eminent domain. As the *Local Competition Order* indicated, such a requirement is a function of the nondiscrimination requirement of Section 224(f)(1) since utilities reasonably could be expected to exercise this authority for the installation of their own facilities and, consequently, should be required to do the same for requesting telecommunications carriers.[73] Similarly, if a utility does, in fact, lease a defined amount of space on a rooftop under circumstances that establish ownership or control, and its antenna structure entirely fills that space, the utility should be required to exercise its authority of eminent domain to make space available for a reasonably-sized CLEC antenna.[74]

8. The Commission Should Require Re-Certification By The States.

States should be required to re-certify to the Commission under Section 224(c)(2). Section 224 contains a reverse preemption provision that permits States to exercise authority over those matters addressed by Section 224.[75] The procedure for reverse preemption requires, *inter alia*, a State to certify to the Commission that it regulates the rates, terms, and conditions for pole

---

73 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1181 (1996)("*Local Competition Order*").

74 Of course, the CLEC must reimburse the utility for the compensation paid to the MTE owner, consistent with the Section 224 modification cost rules adopted in the *Local Competition Order*. Id. at ¶ 1211 ("[T]o the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.").

75 47 U.S.C. § 224(c)(2).

attachments. If a State has not issued and made effective rules and regulations implementing its regulatory authority over pole attachments -- a term that includes conduits and rights-of-way[76] -- it cannot be considered to regulate the rates, terms, and conditions for pole attachments pursuant to Section 224(c)(2).[77] As of February 21, 1992, 19 States had certified to the Commission that they regulate pole attachments.[78]

However, the post-1996 legitimacy and effectiveness of these certifications remains precarious. The 1996 amendments radically altered the earlier requirements of Section 224 thereby potentially changing significantly the basis upon which these States had certified. For example, the 1996 Act imposed the obligation on a utility to provide nondiscriminatory access to any right-of-way owned or controlled by it.[79] Moreover, where the benefits of Section 224 used to apply only to cable television systems, the 1996 Act extended the access benefits to non-ILEC telecommunications carriers in order to advance the Act's goal of promoting telecommunications competition for all services.[80] Finally, in the 1996 Act, Congress added new rate structures,[81]

---

76 Id. at § 224(a)(4)(defining pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility").

77 Id. at § 224(c)(3)(A).

78 See "States That Have Certified That They Regulate Pole Attachments," DA 92-201, *Public Notice*, 7 FCC Rcd 1498 (Feb. 21, 1992). The States that have certified to the Commission are: Alaska, California, Connecticut, Delaware, the District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington.

79 47 U.S.C. § 224(f)(1).

80 Id. at §§ 224(f)(1) and 224(a)(4).

81 Id. at § 224(d)(3) and (e).

created notice requirements[82] and modification requirements,[83] and, significantly, imposed additional State certification requirements.[84] As a result, State regulators must implement a substantial number of new federally-mandated requirements in order to meet the certification standards. The changed circumstances caused by the 1996 Act, as well as the Commission's generally expanded responsibilities to oversee the implementation of local exchange competition, plainly render certifications made prior to the 1996 Act incomplete and ineffective with respect to these new provisions.[85] The Commission should require re-certification by States upon completion of this proceeding to ensure that such State regulations have addressed these new Section 224 provisions and incorporated telecommunications carrier access to intra-MTE conduit and rights-of-way owned or controlled by utilities, consistent with the Commission's rules.

Traditionally, the Commission has not looked behind State certifications to ensure that they were valid or effective.[86] The Commission retains the authority to ensure that certifications are, in fact, true and correct and that State regulation is effective.[87] This is evident in the Supreme

---

82 Id. at § 224(h).

83 Id. at § 224(h) and (i).

84 Id. at § 224(c)(2)(B)(requiring States to consider the interests of subscribers of the services offered via the attachments, not just the subscribers of cable television services).

85 This is not to say that such States currently are not regulating the MTE access matter effectively. Connecticut, for example, has a statute concerning nondiscriminatory MTE access and the Connecticut DPU has issued rules implementing this statute.

86 Implementation of the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, *Report and Order*, 50 Fed. Reg. 18637, FCC 85-179, at ¶ 143 (May 2, 1985).

87 A change in the Commission's policy -- adopted 11 years before enactment of the 1996 Telecommunications Act -- is warranted given the changes made to Section 224 by the 1996 Act. Moreover, a policy of ensuring effective State regulation would be consistent

Court's recent endorsement of the Commission's broad authority to oversee implementation of the 1996 Telecommunications Act.[88] The Commission has declined to exercise this authority in the past. The changes to the 1996 Act, however, do warrant that the Commission's policy of not looking behind State certifications be revisited to a certain extent in that the Commission should require that States' right-of-way regulations satisfy the Commission's baseline rules as a means of ensuring "effective" rules under Section 224(c)(3)(A).[89] This requirement will promote the pro-competitive goals of the 1996 Act by protecting consumers' abilities to access facilities-based alternatives regardless of the responsible regulating body. Moreover, the understanding that greater certification scrutiny by the Commission may occur is likely to raise the level of attention that States will give the MTE access issue.[90]

---

with the oversight position adopted by the Commission in the *Local Competition Order* wherein it established the parameters of reasonable State interconnection and unbundling policies pursuant to Sections 251 and 252. See AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 733 (1999)("While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, and granting exemptions to rural LECs, these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments.").

88 Id.

89 See Bechtel v. F.C.C., 957 F.2d 873, 881 (D.C. Cir. 1992), cert. denied, Galaxy Communications v. F.C.C., 506 U.S. 816 (1992)("[C]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy . . ."); see also Geller v. F.C.C., 610 F.2d 973, 979 (D.C. Cir. 1979)(noting the Commission's duty to reexamine policies in light of changed circumstances).

90 In the *Local Competition Order*, the Commission explained that a State need not make any certification to the Commission in order to assert exclusive jurisdiction over access to pole attachments, as opposed to rates, terms, and conditions of such access. See *Local Competition Order* at ¶ 1240. It is important for the Commission to recognize that nondiscrimination is a term or condition of access to which a State must certify. The scope of Section 224's access requirements (*i.e.*, including rooftops) is also a term or condition of access to which States must certify.

9. MTE Owners Will Not Be Adversely Affected.

The full implementation of Section 224 will not affect the underlying property owners any more than the application of Section 224 currently affects owners of property that contain utility facilities covered by Section 224. Nevertheless, Teligent consistently has taken the view that a "reasonableness component" of nondiscriminatory MTE access for telecommunications carriers will prohibit degradation of the safety and security of the building and its tenants. Moreover, as noted above, Teligent agrees with those States that have MTE access statutes that it is reasonable to require telecommunications carrier indemnification for damages cause by the installation, maintenance, operation, and removal of the telecommunications carrier's facilities (insofar as such damage is not the result of the MTE owner's own negligence).

Furthermore, the question is often raised from a practical perspective of what the impact of fully implementing Section 224 will have on residents of single-family homes. The answer is an easy one. There is little to no danger that these residents will be burdened at all. First, the focus of the Commission's inquiry in this proceeding contemplates multi-tenant environments which, by definition, exclude single family homes. Moreover, Section 224 *already* permits CLECs to access utility ducts, conduits, poles, and rights-of-way in front and back yards of single-family homes and its rules mandate that these utilities exercise eminent domain authority over this private property to accommodate the space requirements of telecommunications carriers and cable operators. Experience demonstrates that extreme circumstances have not prevailed, and single-family home dwellers do not find themselves deluged by telecommunications equipment on their property. Finally, unless a tenant or home owner desires service from a competitive carrier, that carrier has no incentive let alone need generally to access that individual's property. Indeed, Teligent would have no incentive to place its antenna on the rooftop of a single-family home without the

residents' desire to take service from Teligent. Otherwise, the antenna installation would be useless -- it could serve no one but the residents of the house on which it was located -- and would represent a waste of the company's resources. The economics and practical realities of the matter indicate that there simply is no realistic danger that full implementation of Section 224 consistent with the Commission's tentative conclusions would burden single-family home dwellers, leading to antenna farms or unnecessary wires crossing the property.

### B. Appropriately Interpreted, Section 207 of the 1996 Telecommunications Act Could Promote the Development of Competitive Networks.

The Notice seeks comment on the extent to which a nondiscrimination requirement on private property owners can be sustained consistent with, *inter alia*, the application of the *OTARD Second Report and Order*.[91] In the *OTARD Second Report and Order*, the Commission declined to require building owners to permit the placement of over-the-air reception devices on common and restricted access property because of constitutional and statutory concerns.[92] Two Petitions for Reconsideration of that decision remain pending (one of which was filed by Teligent).[93] Reliance on the conclusion in the *OTARD Second Report and Order*, especially when

---

91 Notice at ¶ 60.

92 Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, CS Docket No. 96-83, *Second Report and Order*, 13 FCC Rcd 23874 at ¶ 44 (1998)("*OTARD Second Report and Order*").

93 See Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, CS Docket No. 96-83, *Petition for Reconsideration of the Personal Communications Industry Association, WinStar Communications, Inc., Teligent, Inc., NEXTLINK Communications, Inc., and Association for Local Telecommunications Services* (filed Jan. 22, 1999) and *Petition for Partial*

that order is currently under reconsideration, to avoid action in this proceeding would not only result in prejudging the pending Petitions for Reconsideration but would deny the Commission the opportunity to examine Section 207 in the broader context contemplated by Congress. The Commission should avoid this course.

1. The OTARD Second Report And Order Should Not Deter The Commission From Requiring Nondiscriminatory MTE Access.

The Commission's decision in the *OTARD Second Report and Order* does not preclude the Commission from adopting MTE access rules in this proceeding. As the Commission is aware, it is not bound by its own precedent, particularly with changed circumstances.[94] It need only provide a reasoned explanation for changing its policy.[95] The factual differences underlying the OTARD proceeding and the instant one comprise a more than sufficient basis for a difference in the Commission's policy.

The record that has already been placed before the Commission demonstrating the problems confronted by competitive telecommunications carriers reflects a unique and formidable barrier to competitive entry -- one that is distinct from the video programming context. The decision on common and restricted access areas in the *OTARD Second Report and Order* still permits competitive MVPDs into a building insofar as antennas can be placed on tenant balconies.

---

*Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television* (filed Jan. 22, 1999).

94 See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983)("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.").

95 Id.

Hence, while competitive facilities-based video programming options may be reduced by the *OTARD Second Report and Order*, a small number of competitors remains viable. By contrast, restrictions on telecommunications carrier access to MTEs can prohibit *all* facilities-based competitive options for telecommunications. Teligent continues to believe that the Commission should reconsider its decision in the *OTARD Second Report and Order*, and because the competitive policy objectives and the attending need for Commission action in the instant docket are as compelling, Section 207 provides a jurisdictional basis for granting nondiscriminatory access.

Teligent believes that the WCAI Petition correctly identifies local zoning problems that fixed wireless carriers currently encounter and will continue to confront in attempting to affix their antennas to buildings.[96] Proper application of Section 207 can remedy these problems. Teligent urges the Commission to extend the principles embodied in Section 1.4000 of the Commission's rules to the placement of small antennas used for any fixed wireless service, with the qualification that such rules expressly permit fixed wireless carriers to install small antennae on MTE rooftops.

The authority and principles contained in Section 207 serve as an ancillary basis of Commission authority to ensure that tenants in MTEs have access to their telecommunications carrier of choice for the provision of broadband services that include local exchange service, Internet access, or video programming services. Section 207 operates as congressional

---

[96] Amendment of Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, *Petition for Rulemaking of the Wireless Communications Association International, Inc.* (filed May 26, 1999).

recognition of the Commission's broad authority to ensure that competitive options remain available to tenants in MTEs. Although the authority is specifically granted in relation to competitive sources of video programming services, it may equally be extended to give effect to those provisions of the 1996 Act relating to competitive telecommunications service where those facilities have the capacity to be used to provide video programming services.

2. Section 207 Is Reasonably Applied To Fixed Wireless Carriers.

The expanded interpretation of Section 207 to include additional categories of providers (or potential providers) of video programming services would provide direct authority for the Commission to require rooftop access for fixed wireless carriers. Such an interpretation would not be unprecedented. The Commission declined to narrowly restrict the scope of Section 207 to MMDS. Instead, it concluded that services technologically and functionally similar to MMDS should also be included within the scope of Section 207.[97] Indeed, the Commission recently granted MDS and ITFS licensees the authority to offer two-way services.[98] Similarly, fixed wireless service providing high-speed Internet access (with the capability to provide video programming services thereby) is reasonably included within Section 207: fixed wireless antennas

---

97 Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, IB Docket No. 95-59, CS Docket No. 96-83, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276 at ¶ 30 (1996)("*OTARD First Report and Order*").

98 Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions; Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, MM Docket No. 97-217, File No. RM-9060, *Report and Order on Reconsideration*, FCC 99-178 (rel. July 29, 1999).

are sufficiently small and they receive and transmit over the air services similar to those received and transmitted by MMDS.

Moreover, fixed wireless carriers offer services contemplated by Section 207. Internet-based video offerings continue to proliferate. They increasingly appear similar to video programming offered by a television broadcast station and, therefore, would appear to constitute video programming. Although the Commission declined to adopt a broad definition of "video programming services"[99] for purposes of Section 207, rapid technological developments that render an increased amount of "broadcast" programming over the Internet warrant reconsideration of that conclusion. Some Internet sites, such as Microsoft Netshow, currently provide the capability to watch full motion broadcast video.[100] Moreover, it was reported that NBC intends to invest in and supply programming to an Internet-based service, Intertainer.[101] In its most recent video competition report to Congress, the Commission referred to the Internet as an increasingly competitive source of video programming and noted the development of technologies to enhance this phenomenon.[102] This phenomenon is increasing.[103] The

---

99 Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, CS Docket No. 96-83, *Order on Reconsideration*, 13 FCC Rcd 18962 at ¶ 56 (1998).

100 <www.microsoft.com/netshow/live>.

101 Andrew Pollack, "NBC Backing an On-Line TV Service," New York Times, at D4 (Aug. 3, 1998).

102 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, 13 FCC Rcd 1034 at ¶¶ 97-102 (1998).

103 See, e.g., "Internet Video Growing, With Video-On-Demand Targeted," Communications Daily at 2-4 (Aug. 26, 199).

Commission's rules implementing Section 207 should be expanded to broaden the available delivery mechanisms for video programming. Failure to do so would ignore the conversion that has already occurred.

The Commission's conclusions in the *OTARD First Report and Order* may inform the appropriate approach in the context of MTE access. For example, in the *OTARD First Report and Order*, the Commission determined that impairment of a viewer's ability to receive over-the-air video programming reception includes unreasonable delays and increases in the cost of installation, maintenance or use of an antenna.[104] The delays prohibited by the *OTARD First Report and Order* are analogous to restrictions on and delays concerning MTE access for telecommunications carriers. The purpose behind Section 207 was the promotion of alternative delivery mechanisms for video programming.[105] Where carriers provide a multitude of services such as Internet access, local exchange service, and even the capacity for traditional video programming, their delivery mechanisms should be included within the scope of Section 207.

---

104 *OTARD First Report and Order* at ¶¶ 14, 17.

105 See H.R. Rep. No. 104-204, pt. 1, 123-24 (1995)("The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."). The Conference Report adopted the House provision, with modifications to expand the scope of the provision. See S. Conf. Rep. No. 104-230, 166 (1996).

3. Local Zoning Authority Over Fixed Wireless Carriers Is Severely Limited By Section 332(c)(7).

Because Section 332(c)(7) requires that zoning approval be granted to fixed wireless carriers, the adoption of rules pursuant to Section 207 covering fixed wireless antennas would be consistent with Section 332(c)(7). To the extent that fixed wireless carriers provide wireless common carrier exchange access services, they fall within the definition of "personal wireless services" and are covered by Section 332(c)(7).[106] However, technological differences between mobile and fixed wireless telecommunications carriers limit the regulatory powers of local zoning boards with respect to the latter.

If a CMRS provider's petition for zoning approval is denied, the CMRS provider can still seek approval to locate its antenna elsewhere to serve the relevant consumer market. Consequently, a zoning denial does not necessarily operate as a prohibition to the provision of personal wireless services by mobile carriers.[107] By contrast, a fixed wireless carrier's antenna must be located on the MTE in which the customer it seeks to serve is located. If a fixed wireless carrier's petition for zoning approval is denied, the fixed wireless carrier cannot serve the MTE for which approval was denied. Consequently, a zoning denial of a fixed wireless carrier zoning petition necessarily operates as a prohibition to the provision of personal wireless services for fixed wireless carriers.

---

106 47 U.S.C. § 332(c)(7)(C)(i).

107 Obviously, this has some limitation. Namely, a city-wide or state-wide prohibition or moratorium on CMRS antennas would preclude the CMRS provider from serving the relevant consumer market and would operate as an impermissible prohibition on personal wireless services.

Zoning regulations that prohibit the provision of personal wireless services are proscribed by Section 332(c)(7)(B)(II). Therefore, pursuant to the foregoing analysis, zoning approval is required by Section 332(c)(7)(B)(II) for fixed wireless carriers. Given the practical restrictions on the operation of local zoning authority over fixed wireless carriers, expanding the scope of Section 207 (and the Commission's rules thereunder) to include fixed wireless carriers would not be inconsistent with Section 332(c)(7).

### C. The Commission's Plenary Jurisdiction Over Interstate Wire and Radio Communications Provides the Requisite In Personam and Subject Matter Jurisdiction to Require MTE Owners to Permit Nondiscriminatory Telecommunications Carrier Access to their MTEs.

The Commission is correct to note that Sections 1 and 2(a), when "read together, give the Commission jurisdiction to enforce the Act with respect to 'all interstate and foreign communication by wire or radio.'"[108] This grant of authority, when considered in light of the definitions of wire communication and radio communication, provides the Commission subject matter jurisdiction over telecommunications carrier access to consumers in MTEs and *in personam* jurisdiction over the MTE owners themselves.

#### 1. The Commission Retains Subject Matter Jurisdiction Over Intra-MTE Wiring.

Intra-MTE wiring and space necessary for the installation of other telecommunications equipment are, at a minimum, reasonably considered to be facilities incidental to the transmission of wire communication. The statement is almost self-evident in that, without these facilities, the transmission to consumers in MTEs of interstate communication by wire or radio could not

---

[108] Notice at ¶ 56.

occur.[109] The Commission's subject matter jurisdiction exists over the transmission of interstate communication and all instrumentalities, facilities, apparatus, and services incidental thereto regardless of whether those facilities and instrumentalities exist within or outside a multi-tenant building. Indeed, the facilities on either end of intra-MTE wiring -- CPE, inside wiring, and local loops -- are instrumentalities or facilities of interstate wire communication.[110] One can reasonably infer that the portions of the network between these facilities would also be deemed an instrumentality of interstate wire communication. The Commission unquestionably has subject matter jurisdiction over the use of in-building facilities for the provision of interstate communications.

2. The Commission Retains In Personam Jurisdiction Over MTE Owners.

The Commission has jurisdiction over all persons engaged in interstate wire or radio communication in the United States.[111] To the extent that MTE owners and managers exert

---

109 The Commission has explained that "[o]fferings are incidental to communications and therefore are communications themselves, if they are an integral part of, or inseparable from, transmission of communications." Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, CC Docket No. 93-162, *Second Report and Order*, 12 FCC Rcd 18730 at ¶ 20 (1997).

110 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, *Memorandum Opinion and Order*, 84 FCC2d 50 at ¶ 142 (1980)("Under the 'all instrumentalities' provision of Section 3 of the Act, the Commission receives permissive authority over CPE"); Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order, and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 11897 at ¶ 1 (1997)("Together with CPE, inside wiring constitutes all facilities located on the customer's side of the demarcation point required to transmit telecommunications services over a wireline network."); 47 C.F.R. § 51.319(a)("The local loop network element is defined as a transmission facility . . . ").

111 47 U.S.C. § 152(a).

control over and charge for telecommunications carrier access to the intra-MTE communications network, they become persons engaged in interstate wire communication as that term is literally defined in Section 3(51) of the Communications Act and, consequently, bring themselves within the jurisdiction of the Commission.[112] When access is conditioned upon payment of unreasonable fees, MTE owners are charging for use of the telephone lines. When access is denied, MTE owners are prohibiting use of the telephone lines. This control exerted over a portion of the communications network directly and substantially affects the interstate services that end users receive, the carriers from who they receive them, and the rates they pay for such services. It would be untenable to claim that the exertion of such control does not amount to wire communication -- or, at a minimum, control over the facilities incidental to transmission. Hence, the Commission's plenary jurisdiction over persons engaged in interstate wire and radio communications provides the authority -- indeed, the obligation -- to ensure that the control exerted by MTE owners over the communications network is consistent with the public interest.[113]

---

112 The definition of wire communication includes "all instrumentalities, facilities, apparatus, and services . . . incidental to [the] transmission [of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . . ]. " 47 U.S.C. § 153(51).

113 See GTE Service Corp. v. F.C.C., 474 F.2d 724 (2d Cir. 1973)(court refusing to limit the Commission's jurisdiction where Congress had not explicitly done so, and where the Commission acted for the purpose of its mandated goal to ensure "adequate public communications service.").

### 3. The Commission's Ancillary Jurisdiction Is Sufficient To Require Nondiscriminatory MTE Access.

Sections 1, 2, 201, 224, 251 and 207 all provide direct bases of Commission jurisdiction to require nondiscriminatory MTE access for telecommunications carriers. But, they also serve as the foundation for the exercise of ancillary jurisdiction to accomplish the same objectives. The doctrine of ancillary jurisdiction lends further support for the Commission's authority to require nondiscriminatory MTE access. Where ancillary jurisdiction is invoked, the Commission may regulate a practice or facility over which it possesses actual jurisdiction (such as the competitive provision of interstate wire communication) -- although specific statutory instructions are lacking -- and do so by reference to analogous provisions in the Act (such as Sections 201, 224, 251, and 207).[114] The Commission should not lightly dismiss the option of accomplishing nondiscriminatory MTE access pursuant to ancillary jurisdiction. Indeed, as Chairman Kennard noted in the agenda meeting,[115] the origins of cable television regulation arose from ancillary jurisdiction.[116] Similarly, securing nondiscriminatory MTE access for telecommunications carriers is an appropriate exercise of the Commission's ancillary jurisdiction.

---

114 See, e.g., United States v. Midwest Video Corp., 406 U.S. 649, 663-670 (1972)(discussing the broad authority of the Federal Communications Commission using the doctrine of ancillary jurisdiction).

115 See Remarks by Chairman Kennard, Agenda Meeting of the Federal Communications Commission, June 10, 1999.

116 Teligent explained in detail the ancillary jurisdiction origins of cable television regulation and the analogy to nondiscriminatory MTE access in a White Paper submitted to Thomas Sugrue, Chief of the Wireless Telecommunications Bureau, prior to the initiation of this docket. The document is attached to ALTS' comments, filed today in this proceeding. See "Bringing Telecommunications Competition to Tenants in Multi-Tenant Environments," at 29-34 (submitted May 10, 1999).

The use of intra-building wiring for interstate and foreign communication is not feasibly severable from its use for intrastate communication for purposes of carrier access any more than CPE is severable.[117] Notwithstanding space constraints, it may be physically possible to create duplicate networks within buildings -- one devoted to intrastate communications and the other devoted to interstate communications. But, this arrangement is not economically feasible, nor is it practical. Indeed, Section 2(b) does not require such an extreme result. Given the line of inseverability cases, the partial intrastate usage of these facilities does not obstruct the Commission's jurisdiction over them.

### D. Section 251 Offers Another Basis of Commission Authority to Require Nondiscriminatory Access Within MTEs.

Where the ILEC owns the intra-MTE wiring, the Commission could require the ILEC to make such wiring available to other telecommunications carriers as an unbundled network element pursuant to Section 251(c)(3). Teligent has recommended this approach as a second-best alternative to relocating the demarcation point in all MTEs to the minimum point of entry ("MPOE").[118] Teligent will not repeat its position here. Rather, it will respond to the specific requests for comment contained in the Notice.

---

117 See North Carolina Utilities Comm'n v. F.C.C., 537 F.2d 787, 791 (4th Cir. 1976)("Usually it is not feasible, as a matter of economics and practicality of operation, to limit the use of [CPE] to either interstate or intrastate transmissions"), cert. denied, 429 U.S. 1027 (1976); see also North Carolina Utilities Comm'n v. F.C.C., 552 F.2d 1036, 1043 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977).

118 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *Comments of Teligent, Inc.* (filed May 26, 1999).

It is technically feasible for the use of intra-MTE wiring to be transferred from one carrier to another, in accordance with which one is serving the customer, if there is some point of interface permitted at the building's entrance facilities. ILECs make their intra-building wiring available as a UNE to competitive carriers in several States, such as Florida, Georgia, Kentucky, Nebraska, New York, Oregon, and Tennessee. In fact, New York has provided for such access since 1992. The ongoing and successful implementation of such arrangements demonstrates its technical feasibility.

The UNE approach, however, is suboptimal because it perpetuates a CLEC's reliance on a portion of the ILEC network thereby eliminating a true facilities-based carrier's ability to avoid any dependence on the ILEC. Notwithstanding regulation of ILEC UNE offerings, CLEC reliance on ILEC facilities increases the ability of the ILEC to engage in strategies and behavior designed to delay or raise the costs of competitive entry. In fact, the Commission recognizes that the optimal consumer benefits will arise out of *facilities-based* competition.[119] Reliance on UNE strategies will not achieve the maximum benefits. Instead, the optimal solution would involve relocating the demarcation point in *all* MTEs to the MPOE.[120]

## VIII. A NONDISCRIMINATORY MTE ACCESS REQUIREMENT WILL BE CONSTITUTIONALLY SOUND.

### A. A Nondiscriminatory Access Requirement Does Not Amount to a Taking.

Commission rules that require nondiscriminatory MTE access would be constitutionally sound and consistent with governing case law. An analysis of current Takings Clause doctrine

---

119 Notice at ¶ 4.

120 The need for universal relocation of the demarcation point to the MPOE is discussed fully below in Section XII.

reveals that requiring that MTE access for telecommunications carriers be granted on a nondiscriminatory basis does not constitute a taking. In the first instance, nondiscriminatory MTE access does not amount to a compelled initial physical invasion and, therefore, the *per se* analysis of *Loretto* is not implicated. Rather, it entails placing nondiscriminatory obligations on MTE owners. Consequently, the inquiry into whether a nondiscriminatory MTE access obligation involves a taking must be pursued under the *Penn Central* analysis for regulatory takings.

Teligent is cognizant of the fact that certain Commissioners have expressed concerns that the Fifth Amendment does not contain a nondiscrimination exception.[121] However, the Commission has already found that nondiscriminatory obligations do not necessarily trigger takings concerns. As the Commission noted,

> the right to assert a *per se* taking is easily lost: once a property owner voluntarily consents to the physical occupation of its property by a third party, any government regulation affecting the terms and conditions of that occupation is no longer subject to the bright-line *per se* test, but must be analyzed under the multi-factor inquiry reserved for nonpossessory government activity. . . . once a property owner voluntarily consents to the occupation of its property it can no longer claim a *per se* taking if government action merely affects the terms and conditions of that occupation. . . . . [T]he government has broad power to regulate interests in land that interfere with valid federal objectives.[122]

The Commission's reasoning is fully consistent with several important occasions in this country's history wherein nondiscrimination requirements were held *not* to violate constitutionally-protected property rights. The right to exclude others is one of the essential rights associated with property

---

121 See, e.g., Remarks of Commissioner Powell, Agenda Meeting of the Federal Communications Commission (June 10, 1999).

122 *OTARD Second Report and Order* at ¶¶ 21, 22, and 27.